

***United States Court of Appeals  
for the Second Circuit***



**PETITION**





UNITED STATES COURT OF APPEALS

Second Circuit

In the Matter  
of  
The Application of AAACON AUTO  
TRANSPORT, INC.,  
Petitioner,  
for the issuance of a writ  
of mandamus to  
Hon. MORRIS E. LASKER, United  
States District Judge for the  
Southern District of New York

74-1548

PETITION FOR WRIT OF MANDAMUS.

To the Honorable Chief Judge and the Associate Judges for  
the United States Court of Appeals for the Second  
Circuit:

The petition of Aaacon Auto Transport, Inc. for the  
issuance of a writ of mandamus, directed to the Honorable  
Morris E. Lasker, United States District Judge for the Southern  
District of New York, pursuant to 28 USC Section 1651(a) and  
Rule Section 27 of this Court, respectfully alleges as follows:

1. There is now pending in the United States District  
Court for the Southern District of New York, Civil Action No. 71  
Civ. 3917-MEL in which Aaacon Auto Transport, Inc. is petitioner  
and Continental Insurance Company and J. Wayland Thomas and Cora  
G. Thomas are respondents.

2. Annexed hereto as exhibits are the following  
pleadings and proceedings in said action:

Exhibit

A Petition to Compel Arbitration

Date of Filing

September 10, 1971

ExhibitDate of Filing

B	Memorandum of Order by Judge Lasker.....	June 15, 1973
C	Letter of Ralph J. Zola requesting Reargument and Reconsideration of Memorandum Decision and Order of Judge Lasker.....	June 25, 1973
D	Memorandum of Judge Lasker Endorsing his Decision of June 14, 1973.....	December 11, 1973
E	Motion to Dismiss Petition*.....	December 14, 1973
F	Letter of Judge Lasker Deferring Action of Defendant's Motion to Dismiss.....	March 14, 1974

The above-listed pleadings and proceedings have been chosen from a myriad of papers to identify the issue before this Court. Attached as Exhibit "G" is a further index of papers filed with the Court below in this matter, but which are not germane to the issue involved.

3. Jurisdiction of the District Court is based on subject matter jurisdiction under rules of the United States regulating commerce, 49 USC Sections 3(2), 6(7), 28 USC Section 1337 and 9 USC Sections 2 and 4, the Federal Arbitration Act. The District Court below has expressly found that "subject matter ...is vested in this court...".

4. The action below is a petition seeking an order to compel arbitration under 9 USC Section 4 as provided by a written agreement between the parties.

5. After both sides had put in all of their papers, Judge Lasker heard oral argument and he entered an order stating:

"accordingly we deny the motion to compel arbitration and hold the petition in abeyance

\* The exhibits included as part of this Motion to Dismiss have not been reproduced as part of this exhibit because the same exhibits are reproduced elsewhere in this petition.



pending the outcome of the ICC proceedings."

in essence holding that the issues in this proceeding be referred to the Interstate Commerce Commission for prior determination before the Court would make a final order.

Upon petitioner's motion for reconsideration and reargument, Judge Lasker reiterated his earlier decision and stated that he would entertain a motion to dismiss the petition on the mistaken belief that the Commission had ruled in the matter. After such motion was made by the respondents, Judge Lasker indicated that there was still no final order of the Interstate Commerce Commission. Thereafter, Judge Lasker once again advised all parties by letter (March 14, 1974) that the matter was once again in abeyance.\*

6. A writ of mandamus is sought directing the Court below to vacate the order holding the petition in abeyance pending the outcome of the Interstate Commerce Commission proceedings which said order, in essence, refers the issues in the action to the Interstate Commerce Commission for initial determination. Petitioner seeks a final determination disposing of the issues. Such writ is sought upon the following grounds:

(a) the District Court has sole jurisdiction, to the exclusion of the Interstate Commerce Commission, to pass on the issues in the action now pending before it, -- viz. to determine all matters involving arbitration under the Federal Arbitration Act and to determine the reasonableness of the application of any of the provisions of the Federal Arbitration Act; and

(b) the writ of mandamus prayed for is required in aid of the appellate jurisdiction of this Court, because the order of reference to the Interstate Commerce Commission amounts to abdication of the judicial function depriving the parties of a final

\* Due to an erroneous Notice of Reassignment dated February 4, 1974 from the Deputy Clerk of the District Court stating that the action was reassigned to the calendar of Judge William C. Conner, there was added confusion as to the disposition of this matter which was not clarified until the letter of Judge Lasker dated March 14, 1974.

hearing before the Court on the basic issues involved in the litigation, and said deprivation cannot be adequately reviewed in normal course of appeal.

7. A fuller statement of the nature of the basic issues involved in the litigation and of the authorities justifying issuance of the writ of mandamus prayed for is contained in the brief submitted herewith.

WHEREFORE, petitioner prays that this Honorable Court pursuant to 28 USC 1651(a) and to Rule Section 27, of this Court should either:

(a) enter a rule directing Honorable Morris E. Lasker, United States District Judge for the Southern District of New York, to show cause why a writ of mandamus should not issue, directing the Court below to determine the issues presented in the petitions of the parties forthwith, pursuant to 9 U.S. Code Sec. 4 to the end that a judgment be entered by said Court disposing of the action now pending before it, entitled Aaacon Auto Transport, Inc., Petitioner against J. Wayland Thomas and Cora G. Thomas, Respondents; or

(b) enter an order directing Honorable Morris E. Lasker, United States District Judge for the Southern District of New York, to file an answer within a specified time; and

(c) granting such other and further relief in the premises as to this Honorable Court shall seem meet, just and proper.

Respectfully submitted,

AAACON AUTO TRANSPORT, INC.,

Petitioner

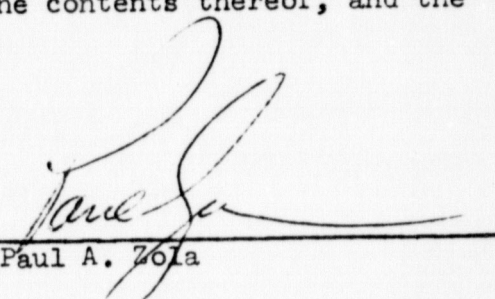
By ZOLA and ZOLA  
Attorneys for Petitioner



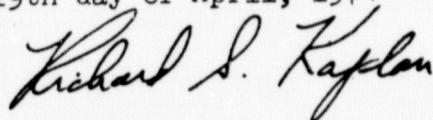
STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss.:

PAUL A. ZOLA, being duly sworn, deposes and says:

I am Executive Vice President of Aaacon Auto Transport, Inc., the petitioner in the above-entitled action. I have read the foregoing petition, and know the contents thereof, and the same is true to my own knowledge.

  
\_\_\_\_\_  
Paul A. Zola

Sworn to before me this  
29th day of April, 1974



RICHARD S. KAPLAN  
NOTARY PUBLIC, STATE OF NEW YORK  
No. 716030C  
Qualified in New York County  
Term Expires March 30, 1976

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
In the Matter of the Arbitration  
of Certain Differences Between

AAACON AUTO TRANSPORT, INC.,

Petitioner,

-and-

J. WAYLAND THOMAS and  
CORA G. THOMAS,

Respondents.  
-----x

71 Civ. 3917

PETITION TO COMPEL  
ARBITRATION PURSUANT  
TO TITLE 9 USCA 4

The petition of the petitioner, AAACON AUTO TRANSPORT, INC., herein respectfully shows to this Court and alleges:

FIRST: This is a petition to compel arbitration pursuant to Title 9 USCA 4.

SECOND: Save for the written agreement to arbitrate hereinafter referred to, this Honorable Court would have jurisdiction of the subject matter of a suit arising out of the controversy hereinafter referred to pertaining to which petitioner, AAACON AUTO TRANSPORT, INC., now seeks to compel arbitration. This Honorable Court would have such jurisdiction under the laws of the United States regulating commerce, 49 USC Section 3 (2) and 6 (7) and 28 USC Section 1337.

THIRD: At all times hereinafter mentioned, petitioner was and still is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 147 West 42nd Street, City, County and State of New York.

FOURTH: At all times hereinafter mentioned, said petitioner was and still is a motor carrier duly licensed by the Interstate Commerce Commission to transport privately-owned



automobiles in interstate commerce throughout the continental United States.

FIFTH: Upon information and belief, respondents are residents of the State of Pennsylvania.

SIXTH: On or about the 11th day of February, 1971, petitioner and respondents entered into a Bill of Lading Agreement pursuant to which said petitioner agreed to transport, and said respondents agreed to pay for the transport of, a certain automobile from the State of Florida to the State of Pennsylvania, subject to the terms and conditions contained in said agreement. A true copy of said Bill of Lading Agreement is annexed hereto and marked Exhibit "A".

SEVENTH: A dispute has arisen between petitioner and respondents under said Bill of Lading Agreement including, but not limited to, the right of respondents to retain monies due and owing petitioner under said Bill of Lading Agreement and an alleged claim for damages by respondents against petitioner.

EIGHTH: One of the provisions of said Bill of Lading Agreement between petitioner and respondents provides, in pertinent part:

"Any claim or controversy, whether founded in contract or tort, arising out of or relating to this agreement or the performance or breach thereof, ....shall be settled by arbitration in the City, County, and State of New York." (Emphasis added)

NINTH: In direct violation of said arbitration clause, respondents commenced an action at law against petitioner, AAACON AUTO TRANSPORT, INC., in THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA, CIVIL DIVISION, demanding damages from petitioner for alleged loss sustained by respondents in connection with the transport referred to above and specifically referred to

in the Bill of Lading Agreement between the parties annexed hereto as Exhibit "A". A true copy of the summons and complaint in said Pennsylvania action is annexed hereto and marked Exhibit "B".

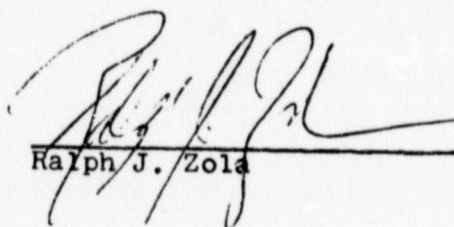
TENTH: By commencing the action at law referred to in the preceding paragraph, respondents have violated the aforementioned arbitration clause and have failed and continue to fail to submit this claim to arbitration in accordance with the above contract provision and thereby prevent an arbitration from proceeding in accordance with the provisions of said clause.

ELEVENTH: Petitioner is aggrieved by the aforementioned failure of respondents to arbitrate their alleged claim for loss under the Bill of Lading Agreement referred to above and they also continue to refuse to pay to said petitioner the balance of Fifty (\$50.00) Dollars still due and owing from respondents to petitioner for the transport of the vehicle referred to above.

TWELFTH: No previous application for the same or similar relief has been made.

WHEREFORE, petitioner, AAACON AUTO TRANSPORT, INC., respectfully requests that an order be entered directing the parties to proceed to arbitrate in accordance with the terms of the Bill of Lading Agreement between the parties and further providing for the appointment of an arbitrator by the Court in the event the respondents shall fail to proceed to arbitration by a fixed date as so directed by the Court, and for such other, further and different relief as may be just and proper, and granting to said petitioner the costs and expenses of this application.

Dated: New York, New York  
August 31, 1971.

  
Ralph J. Zola

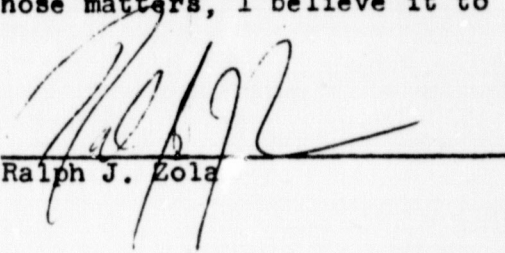


VERIFICATION

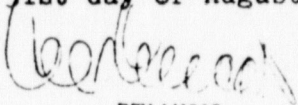
STATE OF NEW YORK     }  
COUNTY OF NEW YORK   } ss:

RALPH J. ZOLA, being duly sworn, deposes and says:

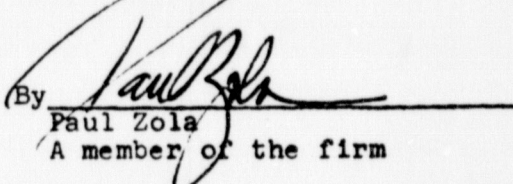
I am the Executive Vice-President of AAACON AUTO TRANSPORT, INC., petitioner herein, a corporation created and existing under and by virtue of the laws of the State of New York. I have read the annexed petition, and know it to be true to my own knowledge, except as to the matters stated to be alleged on information and belief, and as to those matters, I believe it to be true.

  
\_\_\_\_\_  
Ralph J. Zola

Sworn to before me this  
31st day of August, 1971.

  
\_\_\_\_\_  
REX LUCAS  
Notary Public, State of New York  
100-100-1000  
County of New York  
Commission Expires March 1, 1973

ZOLA and ZOLA  
Attorneys for Petitioner  
1472 Broadway  
New York, New York 10036  
Tel. (212) 0X5-4788

By   
\_\_\_\_\_  
Paul Zola  
A member of the firm

PICK UP DATE

2/11/71

ESTIMATED  
DUE DATE

2/11/71

AAACON AUTO TRANSPORT, INC. E 1780  
BILL OF LADING AGREEMENT

PICK UP CAR FROM

J.W. Thomas  
306 - 14th Ave. N.E.,  
St. Petersburg, Fla.  
Phone 894-8556

CONSIGNEE -

Mr. J.W. Thomas  
814 Liberty Road  
Duquesne, Pa.  
Phone (412) 466-8445

REGISTERED CAR OWNER (SHIPPER) James W./Cora G. Thomas

REGISTERED ADDRESS 814 Liberty Ave.

CITY: Duquesne,  
STATE: Pa.CAR MAKE Chrysler TYPE Imperial MODEL DOORS 4 LICENSE # A03627, Pa.  
AUTOMATIC TRANS. yes POWER BRAKES yes POWER STEERING yes SERIAL # A16175905

CONDITION REPORT - V GOOD - F FAIR - B BROKEN - C CRACKED - D DENTED - S SCRATCHED - P PITTED - X MISSING

RF FENDER	<input checked="" type="checkbox"/>	LF WINDOW	<input checked="" type="checkbox"/>	TIRE JACK	<input checked="" type="checkbox"/>	ROOF	<input checked="" type="checkbox"/>	LUGGAGE IN TRUNK ONLY
FRONT BUMPER	<input checked="" type="checkbox"/>	LF DOOR	<input checked="" type="checkbox"/>	SPARE TIRE-WHEEL	<input checked="" type="checkbox"/>	HUB CAPS	<input checked="" type="checkbox"/>	4
FRONT GRILLE	<input checked="" type="checkbox"/>	L BODY SILL	<input checked="" type="checkbox"/>	R LIGHTS	<input checked="" type="checkbox"/>	RADIO	<input checked="" type="checkbox"/>	1
FRONT LIGHTS	<input checked="" type="checkbox"/>	LR WINDOW	<input checked="" type="checkbox"/>	RR PANEL	<input checked="" type="checkbox"/>	HEATER	<input checked="" type="checkbox"/>	1
HOOD	<input checked="" type="checkbox"/>	LR DOOR	<input checked="" type="checkbox"/>	RR WINDOW	<input checked="" type="checkbox"/>	UPHOLSTERY	<input checked="" type="checkbox"/>	2
WINDSHIELD	<input checked="" type="checkbox"/>	LR PANEL	<input checked="" type="checkbox"/>	RR DOOR	<input checked="" type="checkbox"/>	KEYS	<input checked="" type="checkbox"/>	2
LF FENDER	<input checked="" type="checkbox"/>	TRUNK LID	<input checked="" type="checkbox"/>	R BODY SILL	<input checked="" type="checkbox"/>	RR FENDER	<input checked="" type="checkbox"/>	X
RF VENT WINDOW	<input checked="" type="checkbox"/>	R BUMPER	<input checked="" type="checkbox"/>	RF WINDOW	<input checked="" type="checkbox"/>	LR FENDER	<input checked="" type="checkbox"/>	X
LF VENT WINDOW	<input checked="" type="checkbox"/>	R WINDOW	<input checked="" type="checkbox"/>	RF DOOR	<input checked="" type="checkbox"/>			

Shipper guarantees the operating and mechanical condition of the herein mentioned vehicle during transport, and assumes all responsibilities for damage and all liabilities arising therefrom. Regardless of cause, carrier shall not be liable for any damages or consequences from or for any delay in delivery, any rental of substitute vehicle, any mechanical defect occurring during shipment, or any excess mileage. Shipper agrees that driver is an independent contractor and that driver may make any necessary repairs to said vehicle of less than twenty dollars without shipper's consent and repairs in excess of twenty dollars with shipper's prior consent. Shipper shall pay for all said repairs. In the event of damage or loss to said vehicle, shipper shall retain all or part of driver's fee required to pay for same; or, if said damage or loss shall exceed driver's fee, shipper shall forward driver's fee, constituting final freight bill payment due, to carrier within seven days after said damage or loss occurs. Payment to driver by shipper or shipper's agent shall constitute conclusive evidence of satisfactory delivery of vehicle. Retention of driver's fee, at shipper's option, beyond said seven day period shall constitute conclusive evidence of full settlement and satisfaction of any claims against carrier by shipper and shipper's assigns. This Bill of Lading and any shipment hereunder shall not operate as a waiver or avoidance of any contract of indemnity which shipper effected prior hereto or the obligations thereunder which shall devolve primarily upon the indemnitor, and said contract of indemnity shall be and remain in full force and effect. Unless a greater value is declared thereon above, shipper agrees that the declared value of all personal property in the vehicle is under fifty dollars and hereby releases carrier from all obligations for loss or damage thereto in excess of fifty dollars. All terms and conditions of the Uniform Straight Bill of Lading, a copy of which is available to shipper and driver at the office of carrier, are included herein by reference and made a part hereof. Any notice required under said Uniform Straight Bill of Lading shall be invalid and void unless personally signed by and forwarded by the shipper to carrier. The shipper shall commence any legal action necessary to mitigate or recover damages from any third party responsible, or any source liable, therefor. Any recovery by, or satisfaction of said damages to, shipper from any source liable or responsible to shipper therefor, shall, to the extent thereof, operate and constitute a discharge and release of said claims against carrier by shipper and shipper's assigns. Driver alone shall be responsible for all violations of law during the time that the vehicle is in his possession. Driver and shipper consent to the personal jurisdiction of the courts of the State of New York and to service of process upon driver or shipper for the commencement of any action in connection herewith by certified mail addressed to his last known address within the United States. This Bill of Lading agreement supersedes all prior written or oral representations of carrier and constitutes the entire agreement between shipper and carrier and shipper and driver and may not be changed except in writing signed by an officer of carrier. This Bill of Lading agreement shall be deemed executed by the carrier at its principal office in New York City. Any claim or controversy, whether founded in contract or tort, arising out of or relating to this agreement or the performance or breach thereof, is non-assignable and shall be settled by arbitration in the City, County, and State of New York, provided however, that upon such arbitration the arbitrator(s) shall be bound by, and may not vary or modify, the provisions of this Bill of Lading agreement and shall, at the request of any party thereto, apply the rules and laws of evidence that would otherwise apply in a court of proper jurisdiction.

PICKED UP IN THE ABOVE CONDITION EXCEPT AS NOTED

DELIVERED IN THE ABOVE CONDITION EXCEPT AS NOTED

SHIPPER OR  
SHIPPER'S AGENT

X

CONSIGNEE  
(SHIPPER'S AGENT)

X

DRIVER

DRIVER

RECEIVED FULL PAYMENT

DATE

2/15/71

DATE

TOTAL PAYMENT DUE AT DESTINATION \$

50.00

ONLY, IN CASH TO DRIVER WHEN CAR IS DELIVERED IN SATISFACTORY CONDITION.

DRIVER SHALL PURCHASE PERMITS IN ARIZONA, NEW MEXICO AND NEVADA WHERE REQUIRED BY LAW.

DRIVER DESTINATION

NAME James T. Boulger  
ADDRESS Rt. 1  
Chillicothe, Ohio  
CITY 993-2625  
PHONEST. PETERSBURG  
2422 CENTRAL AVE.  
896-4634

EXHIBIT "A-5"



**In The Court of Common Pleas of Allegheny County, Pennsylvania**  
Civil Division

J. MYLAND and CORA G. THOMAS

No. 6204 19 71

## ARBITRATION DOCKET

COMMONWEALTH OF PENNSYLVANIA  
COUNTY OF ALLEGHENY

vs.

MAACON AUTO TRANSPORT, INC.

## SUMMONS IN (TRESPASS ASSUMPSIT)

AMOUNT CLAIMED \$ 1,000.00

TO:

MAACON AUTO TRANSPORT, INC.

Defendant

You are notified that J. MYLAND and CORA G. THOMAS

Plaintiff

(has have) commenced an action in (Trespass Assumpsit) against you at the above number which is

listed for trial on Dec. 13, 19 71 at 9:30 o'clock A.M.

On February 11, 1971, defendant entered into an agreement with plaintiffs by defendant was to transport plain 1964 car from St. Petersburg, Florida to Duquesne, Allegheny Co., Pa. (Nature of Claim) and deliver same in the same condition in which it was received. Copy of freight bill and bill of lading attached hereto. While in defendant's possession, the subject automobile, 1964 Chrysler Imperial four-door sedan, No. 9142150042, said auto mobile, was negligently operated by the agent, servant or employee of defendant so that it was substantially damaged in an amount in excess of ONE THOUSAND FIFTY (\$1,250.00) DOLLARS, greater than its then market value, \$900.00, and caused plaintiffs to also spend the sum of 100.00 to secure their necessary personal effects from the damaged car then being held in Circleville, Ohio. Thus plaintiffs sue for the total sum of ONE THOUSAND (\$1,000.00) DOLLARS as defendant is liable for both in ASSUMPSIT and in TRESPASS.

You are required to be present with your witnesses to defend this action on the above date.

Report to the Assignment Room on the 5th Floor Court House, Room 523.

JAMES F. CLARKE, PROTHONOTARY

By







UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

In the Matter of the Arbitration  
of Certain Differences Between

AAACON AUTO TRANSPORT, INC.,

Petitioner,

71 Civ. 3917

-and-

J. WAYLAND THOMAS and  
CORA G. THOMAS,

MEMORANDUM

Respondents.

-----X

APPEARANCES:

ZOLA & ZOLA, ESQS.  
1472 Broadway  
New York, New York 10036  
Attorneys for Petitioner  
Of Counsel: MICHAEL G. AMES, ESQ.

LaGINESTRA & DONNELLY, ESQS.  
27 Cedar Street  
New York, New York 10038  
Attorneys for Respondents  
Of Counsel: NICHOLAS M. LaGINESTRA, ESQ.

EXHIBIT "B-1"

LASKER, D.J.

Pursuant to 9 U.S.C. §4, petitioner, Aaacon Auto Transport ("Aaacon"), seeks to compel arbitration of differences between it and respondents arising out of the interstate transportation by Aaacon of respondent's car in the course of which the car was damaged. Respondents seek dismissal of the petition on the grounds that 1) this Court lacks subject matter jurisdiction; and 2) the bill of lading agreement which is the basis of the petition is invalid, because it is in conflict with the governing statute (49 U.S.C. §20(11), originally the Carmack Amendment) and the Interstate Commerce Commission ("I.C.C.") regulations promulgated thereunder.

The first ground must be rejected. Subject matter jurisdiction over the petition is vested in this Court without regard to amount in controversy by 28 U.S.C. §1337. Peyton v. Railway Express Agency, Inc., 316 U.S. 350 (1942); Bernstein Bros. Pipe and Machinery Co. v. Denver & R.G.W.R.Co., 193 F. 2d 441 (10th Cir. 1951); Aaacon Auto Transport, Inc., v. Teafatiller, 334 F. Supp. 1042 (S.D.N.Y. 1971). Accordingly, this Court also has jurisdiction under 9 U.S.C. §4.

This determination, however, is merely the beginning of the inquiry. Respondents contend that the



bill of lading agreement between them and Aaacon is in conflict with the I.C.C.'s Uniform Straight Bill of Lading, promulgated pursuant to 49 U.S.C. §20(11), and the agency's other regulations governing the interstate transportation of motor vehicles in that it provides that the shipper consents to the jurisdiction of the New York courts together with personal service <sup>agrees</sup> by mail and/to arbitrate all claims in the State of New York and in that, in a variety of ways, it limits Aaacon's liability in case of loss of or damage to the vehicle. Aaacon argues the contrary, relying in part on the fact that its claims procedures have been filed with the Commission pursuant to its requirements and have not been repudiated by the Commission. Thus, the case is in a posture which is strikingly similar to the situation in Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp., 360 U.S. 411 (1959), in which the Court held that before a district court strikes down a contractual relationship which is subject to I.C.C. control, the parties should be afforded an opportunity to obtain a preliminary determination of the issues involved from the agency. Id. at 421. The Court instructed that the district court proceeding should be held in abeyance pending the outcome of the



agency determination. Id. at 421-22.

The Court held that this procedure should be followed regardless of the fact that the questions presented might ultimately require judicial determination. The Court stated:

"We may assume that the question whether a clause of this kind offends against public policy is one appropriate ultimately for judicial rather than administrative resolution. But that does not mean that the courts must therefore deny themselves the enlightenment which may be had from a consideration of the relevant economic and other facts which the administrative agency charged with regulation of the transaction here involved is peculiarly well equipped to marshal and initially to evaluate." Id. at 420.

The Court quoted with approval the often cited passage in Far East Conference v. United States, 342 U.S. 570 (1952) which states the reasons underlying judicial deference to administrative decision-making:

"Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." Id. at 574-75; accord, River Terminals, supra, at 421.







These factors play as significant a role, here, as in River Terminals, and the rule enunciated in that case applies.

Unlike the parties in River Terminals, however, the litigants before us will not be obliged to commence an inevitably lengthy administrative proceeding as a result of this decision. A proceeding involving the same issues as are raised by this litigation has already been commenced against Aaacon by the Bureau of Enforcement of the I.C.C. and is, in fact, nearing completion. Respondents are willing merely to await its outcome without personally participating in it (affidavit of Nicholas LaCinestra, attorney for respondents, of February 8, 1973); Aaacon is, of course, a party to it and therefore, is in a position to protect its interests before the agency.

Accordingly, we deny the motion to compel arbitration and hold the petition in abeyance pending the outcome of the I.C.C. proceedings.

It is so ordered.

Dated: New York, New York  
June 14th, 1973.

Wendell Cohen  
U.S.D.J.

ZOLA AND ZOLA  
COUNSELLORS AT LAW  
228 W. 41ST STREET  
NEW YORK, NEW YORK 10036

PAUL A. ZOLA  
RALPH J. ZOLA  
MICHAEL G. AMES  
GEORGE T. VOGEL

TELEPHONE  
(212) 354-1444

June 25, 1973

Honorable Morris E. Lasker  
Judge, United States District Court  
Southern District of New York  
United States Court House  
Foley Square  
New York, New York 10007

Re: Aaacon Auto Transport v.  
J. Wayland Thomas et  
71 Civ. 3917-MEL

Honorable Sir:

We are the attorneys for the petitioner Aaacon Auto Transport, Inc. in the above-captioned matter and respectfully submit this letter under penalties of perjury as an application for reconsideration of your Memorandum Decision dated June 14, 1973.

We believe that the Court has inadvertently overlooked certain relevant facts as well as controlling principles of law. Briefly stated, the Commission and the Courts have already upheld the arbitration provision in question. Moreover, Congress has directed District Courts on motions such as the instant one under 9 U.S.C. Sec. 4 to immediately try any issues raised. Delay such as was directed by this Court is not permitted under the statute. Aaacon respectfully invites the courts attention to the following four matters:

1) Prior to the commencement of the proceeding alluded to by the Court in its decision before the Interstate



Commerce Commission involving Aaacon, the full Commission issued its report in Ex Parte 263, 340 ICC 515, 582 (1972), in which the Commission stated that, in its opinion, arbitration provisions do not violate the Carmack Amendment, 49 U.S.C. Sec. 20 (11). This decision of the Commission, a relevant portion of which is annexed hereto for the convenience of the Court, was based in part upon the Senate debates concerning the Federal Arbitration Act in which "the actual physical interstate shipments of goods" was deemed to be appropriate subject matter within the Federal Arbitration Act. Moreover, the decision of the Commission was also based, in part, upon court decisions upholding the validity of clauses providing for arbitration in New York in cases arising under the Carriage of Goods by Sea Act, 46 U.S.C. Sec. 1303 (6) within the jurisdiction of the Interstate Commerce Commission. Indussa Corporation v. S.S. Ranborg 377 F 2d 200 (2d Cir. 1967).

2) In two unanimous decisions, the Second Circuit Court of Appeals in Aaacon v. Levine 456 F2d 1335 (2nd Cir. 1971, Docket No. 71-2100); and, more recently, the Third Circuit Court of Appeals in Aaacon v. Jacobson, \_\_\_\_\_ F2d \_\_\_\_\_ (3rd Cir. 1973; Docket No. 72 Civ. 1197) affirming Frederick B. Lacey, J., upheld the same arbitration agreement as is here in question against the same issues as are raised in the Court's Memorandum Decision, herein. Thus, Judge Lacey specifically found and the Third Circuit Court of Appeals unanimously affirmed, that the arbitration agreement contained in the Bill of Lading did not violate 49 U.S.C. 20 (11) and held that the agreement was lawful, valid and enforceable.

3) Most importantly, the statute under which this motion is brought, 9 U.S.C. Sec. 4, sets forth the grounds and procedures mandated by Congress for the Courts of the United States to follow. Under the statute, this Court had to satisfy itself that the "making of the agreement for arbitration or the failure to comply therewith is not in issue." Upon being so satisfied, Congress has directed that the court "shall" order the parties to arbitrate in accordance with the terms of the agreement. Alternatively if the making of the arbitration agreement or the failure to perform same is in issue, Congress has mandated that the

District Courts "shall" proceed "summarily" to the trial thereof. This language has been interpreted as requiring the court to immediately try the issue. Instituto Cubano De Estabilización Del Azúcar v Theo-takos, 153 F Supp 85,86 (SDNY 1957); Tabos v Dynamic Shipping, 249 F Supp 583 (SDNY 1966). The mandatory nature of the language used by Congress in the Federal Arbitration Act has been noted in Industrial Y Frutera Colombiana v Brisk, 195 F2d 1015, 1016-1017 5th Cir. 1952. It is Aaacon's belief that based upon all of the documents submitted to this court, the two issues set forth by Congress have not been questioned by respondents and that petitioner is entitled to an order directing arbitration. However, assuming arguendo that this Court feels that either of the two issues specified by Congress are contested, petitioner is entitled to an immediate trial thereon. The Supreme Court of the United States in Prima Paint v Flood & Conklin, 388 U.S. 395 (1967) held that the range of questions to be considered by a District Court in a motion under U.S.C. Sec. 4, is extremely limited. We believe that we have demonstrated that the Congress of the United States has limited the questions before the District Courts to two issues only, and has directed the courts to "proceed summarily" with the disposition of motions made to 9 U.S.C. Sec. 4. We respectfully submit that this statute precludes the delay ordered by this Honorable Court.

4) With regard to the rest of the Court's decision, Aaacon respectfully notes that Southwestern Sugar & Molasses Company v Terminals River Corp., 360 U.S. 411 (1959), is inapposite because that case did not deal with a contract provision such as arbitration which has been authorized by the Congress of the United States and has already been upheld by the Federal Courts of Appeals. Finally, we note that the question of service of process by mail is not really an issue because a provision for arbitration in New York automatically permits service of process by mail on a motion under 9 U.S.C. Sec. 4, Lawn v Franklin, 328 F. Supp 791 (SDNY 1971). Moreover, inasmuch as Continental Insurance Company is the real party in interest herein and is subject to service of process in the Southern District of New York, had there been a general provision for arbitration, not mentioning "at New York", this Court would still be required to order arbitration in New York on a motion brought pursuant to 9 U.S.C. Sec. 4. Thus, in Lawn v Franklin, supra 328 F. Supp 791 (SDNY 1971) Judge Gurfein held that a Court must order arbitration in the district in which a motion to compel arbitration under 9 U.S.C. Sec. 4 is brought. Continental Grain Company v Dant & Russell, 118 F2d 967 (9 Cir. 1941).

EXHIBIT

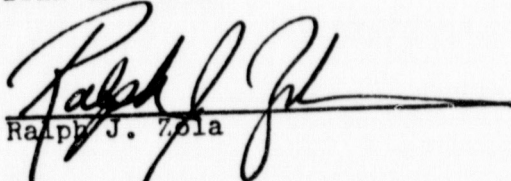
"C-3"



Wherefore, it is respectfully requested that the Court grant this motion for reconsideration, and upon reconsideration direct the parties to arbitrate their claims or alternatively order an immediate trial of the issues.

Respectfully submitted,

ZOLA and ZOLA

  
Ralph J. Zola

RJZ:be

c.c. LaGinestra and Donnelly, Esq.  
10 Platt Street  
New York, New York 10038

EXHIBIT "C-4"



"We should make it known here, however, that we foresee no insurmountable barriers to arbitration being employed in those situations in which shippers and carriers mutually agree prior to the institution of a transportation service to utilize this device to resolve loss and damage claims disputes cognizable under section 20 (11) of the act or corresponding sections of parts II or IV thereof. It is our view that when claims are not voluntarily paid by carriers the use of arbitration by the parties, rather than resort to a court of law, is not proscribed by any portion of the Interstate Commerce Act. We hold the same opinion with respect to the Harter Act....These views, of course, are based on the assumption that arbitration is sought as a means lawfully to resolve bona fide disputes, and that the carrier will not be bound or agree to be bound by the decision of an arbitrator to do anything in contravention of its obligations under the act, our regulations, its right or authority to conduct operations, or any terms or conditions contained in a lawfully published tariff, or to refrain from doing anything that it may thereby be obliged to do." 340 I.C.C. 582 (1972). (Emphasis supplied)

EXHIBIT " C - 5 "

ENDORSEMENT

LAACON AUTO TRANSPORT v. J. WAYLAND THOMAS, 71 Civ. 3917

LASKER, D.J.

By memorandum dated June 14, 1973, we denied Respondents' motion to dismiss and Petitioner's motion to compel arbitration on the ground that decision of these motions should properly await the outcome of proceedings before the Interstate Commerce Commission. Petitioner informally moved to reargue. Subsequent to their application, the Commission rendered its decision, which upholds in every respect the contentions made by Respondents as to the invalidity of the bill of lading agreement on which the petition is based. No. MC-C-7287 (November 15, 1973).

While the Commission's decision supports our denial of Petitioner's motion to compel arbitration, it removes the reason for denying Respondents' motion to dismiss and we note that renewal of that motion would now be appropriate.

Petitioner's motion to reargue is denied.

It is so ordered.

Dated: New York, New York  
December 10th, 1973.

MORRIS E. LASKER

U.S.D.J.

EXHIBIT "D"



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
In the Matter of the Arbitration  
of Certain Differences Between

AAACON AUTO TRANSPORT, INC.,  
Petitioner,

-and-

J. WAYLAND THOMAS and  
CORA G. THOMAS,

Respondents.  
-----x

S I R S :

PLEASE TAKE NOTICE that upon the affidavit of Nicholas M. LaGinestra, attorney for the respondent herein, duly sworn to this 14<sup>th</sup> day of December, 1973, and the exhibits thereto annexed, and upon all the proceedings had heretofore herein, and upon the petition and affidavits filed heretofore herein, the undersigned will move this Court in Room 2903, held before the Honorable Justice Morris E. Lasker on the 26th day of December, 1973, at 10:00 A.M. of that day or as soon thereafter as counsel can be heard, for an order dismissing the petition of the AAACON AUTO TRANSPORT, INC., and for such other and different relief as to this Court shall seem equitable, just and proper, together with costs.

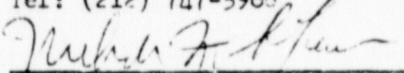
Yours, etc.

LAGINESTRA & DONNELLY  
Attorneys for Respondent  
10 Platt Street  
New York, New York 10038  
Tel: (212) 747-5968

Dated: New York, New York  
December 14, 1973

TO: ZOLA and ZOLA  
Attorneys for Petitioner  
1472 Broadway  
New York, New York 10036

by:

  
Nicholas M. LaGinestra  
Member of the firm

71-CV-3917-MEL

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-x

In the Matter of the Arbitration  
of Certain Differences Between

AAACON AUTO TRANSPORT, INC.,

A F F I D A V I T

Petitioner,

-and-

J. WAYLAND THOMAS and  
CORA G. THOMAS,

Respondents.

-x

STATE OF NEW YORK )  
                              ) SS:  
COUNTY OF NEW YORK )

NICHOLAS M. LaGinestra, being duly sworn, deposes and says:

I am an attorney at law duly authorized to practice law before  
this Honorable Court, and a member of the law firm of LAGINESTRA & DONNELLY.

I am the attorney for the respondents herein, having appeared  
these  
for the purpose of/proceedings only, and I am fully familiar with the  
proceedings presently pending before this Honorable Court.

These special proceedings were originated by the filing with,  
and presentation to, this Honorable Court of a petition of the petitioner  
herein dated August 31, 1971 seeking an order pursuant to Title 9 USCA 4,  
directing that arbitration be compelled in a manner provided in a bill  
of lading issued by the petitioner to the respondents.

Your deponent respectfully begs leave of this Honorable Court  
to refer to the same now on file. Your deponent opposed the said motion  
by affidavits now on file with this Honorable Court.

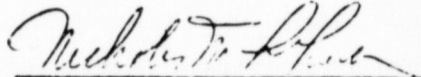
The matter came on to be heard before this Honorable Court on  
May 10, 1972, and thereafter memoranda of law were submitted, and after  
due deliberation by this Honorable Court a memorandum was issued dated  
June 14, 1973, a copy of which is hereto attached. Deponent, pursuant  
to the instructions of this Honorable Court in the said memorandum,  
refrained from any action.

Thereupon an endorsement was issued by this Honorable Court  
dated December 10, 1973, indicating that this Honorable Court will  
entertain a motion to dismiss the petition. A copy of that endorsement  
is hereto attached and made part of this affidavit.

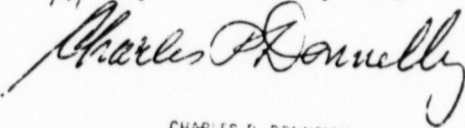
EXHIBIT

"E-2"

WHEREFORE, your deponent prays that an order be issued dismissing the petition of the AAACON AUTO TRANSPORT, INC., and allowing the respondents herein to take such action as they see fit to enforce their claim, or grant such relief as to this Honorable Court may seem just and proper in the premises, together with costs.

  
Nicholas M. LaGinestra

Sworn to before me this  
14<sup>th</sup> day of December, 1973.



CHARLES P. DONNELLY  
NOTARY PUBLIC, State of New York  
- No. 30-0590825, Nassau County  
Commission Expires March 30, 1975



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
UNITED STATES COURT HOUSE  
NEW YORK, N. Y. 10007

CHAMBERS OF  
JUDGE MORRIS E. LASKER

March 14th, 1974

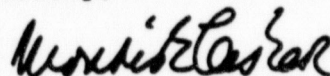
TO: All Counsel

RE: Aaacon Auto Transport, Inc. v. J. Wayland Thomas  
and Cora G. Thomas  
71 Civ. 3917

Since the decision rendered by the Administrative Law Judge of the Interstate Commerce Commission (No. MC-C-7287) is not a final determination by the Commission, we believe that it would be appropriate to defer action on defendants' motion to dismiss until such time as the Commission renders a final decision.

The parties are instructed to acquaint the Court with any further agency actions relevant to the case.

Sincerely,



MEL/cw  
Zola and Zola, Esqs.  
LaGinestra & Donnelly, Esqs.

EXHIBIT "F"

EXHIBIT GSupplementary Index of Papers

Petitioner's Notice of Motion to  
Compel Arbitration.....

Petitioner's Memorandum in Support  
of Motion.....

Respondent's Special Appearance....

Respondent's Memorandum of Law.....

Reply Memorandum in Support of  
Motion.....

Respondent's Further Memorandum of  
Law.....

Affidavit of N. M. LaGinestra, Esq.  
In Opposition to Petition.....

Responsive Affidavit by Ralph J.  
Tola in Reply to Affidavit of  
N. M. LaGinestra, Esq.....

Supplemental Motion in Support of  
Motion.....

Respondent's Affidavit and Notice  
of Motion to Dismiss the  
Petition.....

Plaintiff's Affidavit in Opposition  
to Motion to Dismiss Petition..

**EXHIBIT "G"**